Supreme Court, U.S.
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No. 01-1875

In the

Supreme Court of the United States

GUARD PUBLISHING COMPANY, d/b/a
The Register- Guard,

Petitioners,

v.

RAYMOND D. WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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ARGUMENT

A. INJUNCTIVE RELIEF PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT ON A *GISSEL* CATEGORY II BARGAINING ORDER THEORY IS INAPPROPRIATE WHERE THE MECHANISM FOR A FREE AND FAIR ELECTION HAS NOT BEEN CREATED.

It is axiomatic that the "election process" the National Labor Relations Board ("the NLRB") claims was "impeded" by *The Register-Guard* must precede an election. Opp`n. Br. 3, 8 (citing *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 40 (2nd Cir. 1975)). In the instant case, there was no election. The union never even filed a Representation Certification petition ("RC petition"). There was no "election process" because the union failed to avail itself of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 151 et. seq., and petition the Region for an election pursuant to Section 9(c) of the NLRA. *The Register-Guard* did nothing to prevent the union from petitioning the Region for an election. A free and fair election pursuant to the NLRA simply cannot occur without even attempting to create the mechanism for an election. The union failed to avail itself of the NLRA; it should thus be precluded from its remedial provisions.

B. THE NLRB FAILED TO CONSIDER EMPLOYEES' RIGHTS; THE PUBLIC INTEREST HAS BEEN IGNORED.

Perhaps the most disturbing aspect of the instant case is the NLRB's complete disregard for the employees' ability to exercise their Section 7 rights under the NLRA and have an election. Ironically, new NLRB General Counsel Arthur Rosenfeld recently announced to the public that 10(j) injunctions "should be used to protect the right of employees to freely choose whether or not they want union representation." G.C. Memorandum 02-07 (August 9, 2002); Supplemental Ap. 2a. General Counsel Rosenfeld specifically stated "in the union organizing context, Section 10(j) relief appropriately fosters employee free choice where the processing of a representation petition is blocked by serious

unfair labor practices but the petitioner would be willing to proceed to an election under the protection of a court-ordered injunction." *Id.* The General Counsel explained that "in the union organizing context" a 10(j) injunction should be used to create a fair secret ballot election, ***not*** a bargaining relationship by judicial fiat. A forced bargaining relationship would trample employees' Section 7 rights to refrain from organizing a union.

In the instant case, the employees were never presented any chance to vote.

C. THE NLRB CITED NO AUTHORITY TO SUPPORT A 10(J) INJUNCTION BASED ON A *GISSEL* CATEGORY II BARGAINING ORDER THEORY WHERE NO RC PETITION WAS FILED, NO ELECTION WAS HELD, NO DEMAND FOR RECOGNITION BASED ON A PURPORTED UNION AUTHORIZATION CARD MAJORITY WAS MADE, AND THERE ARE NO UNION AUTHORIZATION CARDS.

The NLRB cited only one case to support 10(j) relief, on a *Gissel* category II theory, *see NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), *Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652 (9th Cir. 2001). Opp'n. Br. 7-8. In *Stephen Dunn & Assocs.*, the union initially demanded recognition pursuant to a purported union authorization card majority, the employer refused to recognize the union, the union filed an RC petition, the union lost the election, the union filed unfair labor practice charges, the company committed "serious but less pervasive" unfair labor practices, the union demonstrated majority support through a disputed union authorization card majority, and bargaining was ordered on a *Gissel* category II theory. *Stephen Dunn & Assocs.*, 241 F.3d at 658-60, 666.

Here, the union never demanded bargaining pursuant to a purported union authorization card majority, the union never filed an RC petition, there was no election, the union never obtained majority support through union authorization

cards,[1] there were no union authorization cards, and employee testimony invalidated the petitions to demonstrate majority support. Furthermore, assuming, *arguendo*, that the allegations levied against *The Register-Guard* are upheld by the NLRB, the allegations do not warrant a bargaining order. *See P.H. Nursing Home, Inc.*, 332 NLRB No. 27 (September 28, 2000).

The NLRB cited three *Gissel* category I cases to support its position; however, each case has serious legal and factual flaws when applied to the instant dispute.

In *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied, 519 U.S. 1055, 117 S. Ct. 683, 136 L. Ed. 2d 608 (1997), the union obtained uncontested union authorization cards, demanded recognition of the employer,

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[1] The NLRB implied, without authority, that there is no legal difference between a union authorization card and the petitions signed in the instant case. Opp'n. Br. 10. The NLRB relied exclusively upon case law regarding union authorization cards to make its argument. With all due respect, this is a novel issue of law that should be first addressed by the NLRB, not this Honorable Court. This argument is not currently before this Honorable Court, but, to the extent that it is persuasive authority on the issue, *The Register-Guard* respectfully directs this Honorable Court to its decision in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-78, 94 S. Ct. 495, 499, 38 L. Ed. 2d 495 (1973), where, in the context of recognition slips that were signed by employees prior to an election to waive an initiation fee if the union won an election, and were actually shown to coworkers, by a union, to demonstrate purported majority support before an election, this Honorable Court explained:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, ***if only because many employees respect their coworkers' views on the unionization issue.***

Savair Mfg. Co., 414 U.S. at 277, 94 S. Ct. at 499, 38 L. Ed. 2d 495. (emphasis added). Regardless, a petition has ***never*** supported a 10(j) injunction based on a *Gissel* Category II bargaining order theory.

and filed an RC petition for an election. *Electro-Voice, Inc.*, 83 F.3d at 1563-65; *see also*, *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996). In response to the demand for recognition, the employer committed serious and pervasive unfair labor practices, i.e., *Gissel* category I violations, including terminating one-third of its workforce, threatening to close the plant, threatening employees for supporting the union, conditioning grievance remedies on withdrawing support for the union, and engaging in surveillance. *See Electro-Voice, Inc.*, 83 F.3d at 1566; *see also*, *Electro-Voice, Inc.*, 320 NLRB at 1112. Nothing so draconian occurred with *The Register-Guard*. However, even in *Electro-Voice, Inc.*, a *Gissel* category I case, the union obtained a union authorization card majority and filed an RC petition for an election.

The Seventh Circuit, in *Electro-Voice, Inc.*, ruled that a union has an obligation to put an employer on notice that there exists a true question of representation ***before*** a bargaining order can issue. The court explained that "when a union requests recognition and bargaining from an employer which was presented with cards showing a majority support for the union and the employer subsequently engages in unfair labor practices which destroy the 'laboratory conditions' needed for a fair election, the employer forfeits any right to an election and must bargain with the union or violate section 8(a)(5) of the [NLRA]." *Id.* at 1572.

In the instant case, *The Register-Guard* was never presented with, or even offered, union authorization cards, nor did the union ever claim to possess union authorization cards. The record evidence demonstrates there were no union authorization cards, nor a RC petition for an election. The union wrote a letter on September 26, 2000, demanding bargaining ***retroactive*** to June 1, 2000. In response to the letter, *The Register-Guard* refused to recognize the union and explained that it would only recognize the union after it was certified by an NLRB-conducted secret-ballot election. *The Register-Guard* simply demanded the union to avail itself of the NLRA.

Asseo v. Pan Am. Grain Co., 805 F.2d 23 (1st Cir. 1986), was a *Gissel* category I case due to the "overt violations of the Act" and "flagrant misconduct" of the employer, including: terminating four of twenty-two employees who were "prominent" union supporters, "offering money for a vote against the Union, threats to discharge employees who supported the Union, and threats to close the plant should the Union prevail." *Pan Am. Grain Co.*, 805 F.2d at 27-28. Furthermore, the employer "instigated a petition disavowing interest in the Union ... that employees signed out of fear of reprisals." Even so, the union, in *Pan Am. Grain Co.*, availed itself of the NLRA by filing an RC petition, and, after losing an election, demonstrated majority support through uncontested union authorization cards. *Id.* at 25, 28-29.

Pan Am. Grain Co., simply does not apply to the instant case. The NLRB has pursued a *Gissel* category II theory against *The Register-Guard*. *Pan Am. Grain Co.*, was a *Gissel* category I case. Furthermore, the facts in *Pan Am. Grain Co.*, support *The Register-Guard's* arguments because the union filed an RC petition, there was an election, and the union demonstrated majority status through valid union authorization cards.

The NLRB also cited *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2nd Cir. 1975), to support a 10(j) injunction against *The Register-Guard*. In *Trading Port, Inc.*, the employees initially engaged in a recognition strike, then filed an RC petition. During the election campaign, the employer committed unfair labor practices, including: threats of job loss if the union won the election, promises conditioned on abandoning support for the union, threatening to close its business, coercively interrogating employees about how they would vote, and discriminating against union supporters in its rehiring process after the strike, but before the election. The union lost the election and the NLRB sought bargaining pursuant to *Gissel* based on valid union authorization cards the employees had signed prior to the election. *See Trading Port Inc.*, 517 F.2d at 35-36; *see also Trading Port, Inc.*, 219

NLRB 298, 298 (1975). In *Trading Port, Inc.*, the Second Circuit reversed and remanded the District Court's denial of a 10(j) injunction for a finding of whether the alleged unfair labor practices "were in fact so serious as to warrant the issuance of an interim bargaining order." 517 F.2d at 40. The NLRB later ordered bargaining pursuant to *Gissel* because, due to "the nature and pervasiveness of the [employer]'s unfair labor practices ... a fair election (is) impossible and [ ] a bargaining order is warranted to best protect the employees' rights." *Trading Port, Inc.*, 219 NLRB at 300.

Of particular import to the instant case was the Second Circuit's narrow finding that:

> ... the issuance of a bargaining order by a district court ***after a union has lost an election*** is, undoubtedly, a serious measure which should not be undertaken whenever a claim of unfair labor practices is made. ***We hold only that when the Regional Director makes a showing, based on authorization cards***, that the union at one point had a clear majority and that the employer ***then*** engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible, the district court should issue a bargaining order under § 10(j). In such a case the election process has been rendered so meaningless by the employer, that the ***authorization cards*** are a clearly superior gauge of employee sentiment.

Trading Port, Inc., 517 F.2d at 40 (emphasis added). In the instant case, there is no authority to support the conclusions drawn by the courts below. A 10(j) injunction compelling *The Register-Guard* to bargain prior to an NLRB determination on the underlying issues is simply not warranted.

D. A BARGAINING RELATIONSHIP SHOULD NOT BE CREATED BY "JUDICIAL FIAT."

The NLRB cited *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1194 (5th Cir. 1975) as a different but sufficiently analogous authority to support its argument. Opp'n. Br. 8. The NLRB has misstated the proposition for which *Pilot Freight Carriers, Inc.* stands. In *Pilot Freight Carriers, Inc.*, the union demanded bargaining based on a union authorization card majority and the employer "repeatedly refused" to bargain. *See Pilot Freight Carriers, Inc.*, 515 F.2d at 1190. In *Pilot Freight Carriers, Inc.*, the employer and union agreed to a "'final and binding card check' to 'resolve the representational issues'." 221 NLRB 1026, 1028 (1975). The Fifth Circuit was loathe to compel bargaining because "[h]ere the signing of union authorization cards precipitated the entire controversy; hence the status quo ante was that period prior to any union activity when the drivers and dockworkers were unrepresented. An interim bargaining order would materially alter that status, creating by judicial fiat a relationship that has never existed." *Pilot Freight Carriers, Inc.*, 515 F.2d at 1194 (citing *Fuchs v. Steel-Fab, Inc.*, 356 F.Supp. 385 (D.Mass. 1973); accord *Wells v. Brown & Root, Inc.*, 65 F.Supp. 2d 1264, 1276 (S.D.Ala. 1999). *See also, Wilson v. Hart Ski Mfg. Co.*, 472 F.Supp. 484, 486 (D.Minn. 1979) (10(j) injunction denied where unfair labor practice charges and petition for injunction were contemporaneously filed because a bargaining order through an injunction would "go far beyond maintaining the status quo."); *Hirsch v. Pick Mt. Laurel Corp.*, 436 F.Supp. 1342, 1359 (D.N.J. 1977) (10(j) injunction denied because "a mandatory bargaining order would recognize a union which has not shown that it ever received the support of an uncoerced majority of workers."). In the instant case, a bargaining relationship has been created by judicial fiat. The injunction has destroyed the status quo.

E. AN ELECTION IS THE PREFERRED METHOD OF SELECTING A COLLECTIVE BARGAINING REPRESENTATIVE.

The Register-Guard continues to have a good faith doubt about whether a union represents its Distribution Department employees. There was never an RC petition filed, there was no election, and there were no union authorization cards.

The NLRB has already held:

> Section 9(c) of the [NLRA] provides orderly and peaceable procedures for the determination of all questions concerning the representation of employees under the [NLRA] ... it is clear that, once a petition has been filed under Section 9(c), the Board has the power and the obligation not only to decide the question of representation in accordance with the statutory provisions and the congressional objectives prompting their enactment, but also to regulate the use of the processes in accordance with these provisions and objectives, and protect them against abuse.

Philanz Oldsmobile, Inc., 137 NLRB 867, 881 (1962). The NLRB appears to be abusing its own processes in the instant case by circumventing Section 9(c) of the NLRA, and seeking to compel bargaining absent filing an RC petition.

This Honorable Court, in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 310, 95 S. Ct. 429, 434, 42 L. Ed. 2d 465 (1974), (emphasis added), summarized its ruling by explaining "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, ***has the burden of taking the next step in invoking the***

Board's election procedure." Here, the alleged unfair labor practices occurred contemporaneous with or subsequent to June 1, 2000. None of the alleged violations "impaired the electoral process." The union was obligated to "take the next step in invoking the Board's election procedure." The union never availed itself of the NLRA.

In *Snow v. NLRB*, 308 F.2d 687, 691 (9th Cir. 1962), an appeal from the NLRB that enforced a *Gissel* bargaining order, the Ninth Circuit explained:

> ... if [an employer] in good faith doubted that the union represented a majority of their employees on (the date recognition was claimed), they were warranted in refusing to recognize the union until the claim was established by a Board election, even though the union in fact had majority status at that time."

The Register-Guard absolutely doubted the union's dubious claim of majority status made on September 26, 2000, ***retroactive*** to June 1, 2000.

The statutory framework of Section 9(c) of the NLRA is designed to promote a democratic election and compel a union to assert that there is an objective question of representation. Elections protect employees' rights. Unions must risk the ballot box. In the instant case, the union has never availed itself of the NLRA and asserted that there was an objective question of representation to compel an election. It is just rank speculation to predict how the union would have fared if it had risked the ballot box. In essence, the union has won the lottery without ever purchasing a ticket.

CONCLUSION

Wherefore, Petitioner, *The Register-Guard*, respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-07 August 9, 2002

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Utilization of Section 10(j) Proceedings

During the time that I have been General Counsel, it has become clear to me that the Section 10(j) program is, and must continue to be, an important tool in administering the Act. In certain cases, temporary injunctive relief under Section 10(j) of the National Labor Relations Act is a necessary and effective way to protect employees' Section 7 rights and the Board's remedial processes. To that end, the regional offices should consider the propriety of interim injunctive relief in every case. At the Field Managers' conference in June 2002, a recent decline in the number of cases identified for Section 10(j) relief by regional offices was noted. To assure that all cases warranting interim relief receive full consideration in the regional offices, the Division of Operations Management, at my request, has begun to discuss with you whether any cases under investigation may be appropriate 10(j) vehicles. In addition, as a method of providing guidance on the types of cases I believe warrant Section 10(j) relief, the Injunction Litigation Branch has begun to post on its Outlook bulletin board descriptions of all Section 10(j) cases for which I have sought Board authorization.

Certainly not every complaint warrants Section 10(j) relief. In reviewing cases, the regions should continue to evaluate two factors. Most important is the potential threat that the Board's ultimate order will be ineffective to remedy the unfair labor practices and to protect statutory rights. The other factor is the strength of the alleged violations.

As to the first element of Section 10(j) analysis–the threat of remedial failure–I am particularly interested in the utilization of Section 10(j) to protect the right of employees to freely choose whether or not they want union representation. For example, in the union organizing context, Section 10(j) relief appropriately fosters employee free choice where the processing of a representation petition is blocked by serious unfair labor practices but the petitioner would be willing to proceed to an election under the protection of a court-ordered injunction. Recently, I requested that the Board authorize Section 10(j) relief in a case where an employer discriminatorily laid off and refused to rehire employees and the union indicated that, if the court granted a Section 10(j) injunction, it would file a request to proceed to an election. Where employers assist and recognize unions that represent only a minority of unit employees, Section 10(j) injunctions that order the parties to sever that relationship permit employees to freely select whether or not they want union representation. Similar considerations of protecting employee free choice are also present in serious cases of union picket line violence.

An interim bargaining order may be necessary to protect the Board's ultimate remedy. For example, when a successor employer unlawfully refuses to recognize a union that represented its employees under the predecessor, an interim bargaining order preserves the employees' choice of representation. In addition, when a successor employer makes unilateral changes after commencing operations, an interim bargaining order limits the potential burden of a Board restoration order that could appear punitive. Further, where a recidivist respondent is engaged in a repeated pattern of unfair labor practices, the violations are likely to erode employee Section 7 rights over time and may warrant Section 10(j) relief.

Concerning the "success on the merits" factor, the allegations of the complaint must be sufficiently strong that the Board likely will enter the final relief sought on a temporary basis through the Section 10(j) proceeding. The clarity of the

alleged violations is an important factor in the 10(j) determination because interim equitable relief should be imposed on respondents only when it is likely that the Board will impose such relief permanently.

Finally, I believe that regions should continue to use the expedited hearing procedures outlined in GC Memorandum 94-17, particularly in cases where the charged party has refused to cooperate in the investigation and the region believes that it will raise a substantial defense at the administrative hearing. In those cases, the regions should reevaluate the need for Section 10(j) relief immediately after the close of the hearing, and seek Section 10(j) authority if it is still warranted. The regions also may reassess whether to seek Section 10(j) authority in close Section 10(j) cases where a favorable decision of the administrative law judge issues promptly after the hearing closes and the passage of time has not defeated the need for interim relief or the ability to restore the status quo.

In sum, where an interim injunction will restore employee statutory rights, facilitate the prompt holding of a fair election, or retain collective bargaining rights, Section 10(j) proceedings may be appropriate. Therefore, the regional offices should carefully investigate the impact of unfair labor practices on employee statutory rights, evaluate whether cases warrant Section 10(j) relief, and promptly submit those cases they believe are appropriate to the Injunction Litigation Branch in the Division of Advice.

/s/
A.F.R.